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In the Supreme Court
of the United States

OCTOBER TERM 1963

No. 953

THE PRESIDENT OF INDIA, ACTING BY AND THROUGH THE DIRECTOR OF THE INDIA SUPPLY MISSION,

Petitioner,

vs.

WEST COAST STEAMSHIP COMPANY, an Oregon corporation,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT WEST COAST STEAMSHIP COMPANY IN OPPOSITION

KENNETH E. ROBERTS
12th Floor, Standard Plaza
Portland, Oregon 97204
Proctor for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-64

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OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix A-11) is reported at 213 Fed. Supp. 352. The opinion of the Court of Appeals (Petitioner's Appendix B 34-35) is reported at 327 F.2d 638.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1964. The petition for Writ of Certiorari was filed on the 27th of March, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an American Merchant Vessel equipped with all of the time honored traditional navigational aids in 1960 for a voyage to India from the United States of America is unseaworthy as a matter of law because not equipped with radar or loran.

2. Whether the Courts below correctly found that the vessel was seaworthy at the commencement of the voyage and whether the findings of the Courts below were "clearly erroneous."

STATUTES INVOLVED

The statute involved is 46 U.S.C. 1300 (the Carriage of Goods by Sea Act) which is Petitioner's Appendix C.

STATEMENT

This is an action by Petitioner against Respondent to recover damages because of partial loss of cargo on the SS PORTLAND TRADER on a voyage from the United States of America to India.

The SS PORTLAND TRADER was an ocean-going Liberty type vessel and on the 19th of October, 1960 she was equipped with all of the time honored traditional navigational aids (213 Fed. Supp. 356).

On the 19th day of October, 1960 the India Supply Mission, by and through its Deputy Director acting for and on behalf of the President of India, executed a Voyage Charter Party with West Coast Steamship Company and pursuant to the Charter Party and on or about the 5th of December, 1960, approximately 9800 long tons of bulk wheat in good order and condition was loaded aboard the vessel at Vancouver, Washington for delivery in India.

The vessel departed on her voyage on or about the 5th of December, 1960 and the Master of the vessel, exercising his own discretion and judgment and seamanship decided to traverse the Sulu Sea in the Republic of Philippines on the voyage from Honolulu to Singapore (R. 41). Prior to entering the Sulu Sea the Master had decided to obtain a fixed departure from an unused unlighted lighthouse on the south end of Tubbataha Reef (R. 53) and in attempting to locate this Reef, at full speed and in the dark early hours of the morning of January 5, 1961 he stranded his vessel on the southern end of the Reef (R. 58).

Contrary to Petitioner's assertion (Petitioner's Brief 3) the Respondent did not suggest to the Master of the SS PORTLAND TRADER that he locate the lighthouse in the manner in which he did and contrary to Peti-

tioner's assertion (Petitioner's Brief 3) Respondent did not earlier lose one of its vessels on the same route.

The Trial Court found that the waters of the Sulu Sea "were known to be dangerous, but no more so than any other well recognized sea lanes throughout the world" and that for more than a century the route followed by the vessel "had been recognized as one for sea traffic between the Hawaiian Islands and Singapore (213 Fed. Supp. at p. 355).

The charts aboard the vessel were current and up to date, as were the Notice to Mariners and Sailing Directions (R. 79).

The Trial Court found that the vessel was seaworthy and that the Master's negligence *was the sole cause of the loss*. The Trial Court recognized that radar and loran could be valuable aids to navigation and held that their absence did not render the PORTLAND TRADER unseaworthy under the particular facts of the case (213 Fed. Supp. at pp. 357, 362).

The Trial Court recognized the long established rule that the determination of seaworthiness is a question of fact

Luckenbach v. *W. J. McCahan*, 248 U.S. 139 (1918);

Mahnich v. *Southern SS Co.*, 321 U.S. 96, 98, 99 (1944);

Morales v. *City of Galveston*, 370 U.S. 165 (1962).

At the commencement of the voyage of the SS PORTLAND TRADER the evidence clearly indicated

that some vessels were equipped with radar and loran and others were not and in considering the question of navigational equipment aboard a vessel the Court did hear evidence as to the custom and practice of the industry.

Boudoin v. *Lykes Bros. SS Co.*, 348 U.S. 336 (1955);

Metropolitan Coal Co. v. *Howard*, 155 F.2d 780 (C.A. 2, 1946);

United States Steel Products Co. v. *American & Foreign Insurance Co.*, 82 F.2d 752, (C.A. 2, 1936).

The Trial Court did not find as urged by Petitioner that radar and loran would become essential to seaworthiness "only upon proof of a custom and practice in the industry" (Petitioner's Brief 5); it held (213 Fed. Supp. at p. 357):

> "* * * * It is my considered judgment that the employment of radar in connection with the navigation of tramp steamers under the facts and circumstances is still in the period of transition and at the time of this occurrence was not so essential in navigation that its absence would give rise to a finding of unseaworthiness. I make the same finding with reference to the absence of loran.
>
> "The overwhelming weight of the evidence in the case is that there is no world-wide or American practice or custom with reference to the use of radar and loran as aids to navigation." (213 Fed. Supp. 356)

The Court of Appeals Affirmed Per Curiam and adopted the Trial Court's opinion as its own and we submit that the case raises no question of general importance and that further review by this Court is not warranted.

ARGUMENT

Of the considerations for granting or refusing a Writ of Certiorari expressed in Rule 19 of this Court, only the following are possibly applicable:

> (1) Rule 19, Section 1 (b): where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals in the same matter * * *
>
> (2) Rule 19, Section 1 (b): where a Court of Appeals * * * has decided an important question of federal law which has not been, but should be, settled by this Court * * *
>
> (3) Rule 19, Section 1 (b): where a Court of Appeals * * * has decided a federal question in a way in conflict with the applicable decisions of this Court * * *

Respondent submits that none of the policy reasons expressed in Rule 19 apply despite Petitioner's desperate striving to bring himself within the Rule and that the petition for certiorari should be denied.

The ordinary factual questions presented in cargo damage cases are not worthy of the time of this Court which has established the rule that an Appellate Court in Admiralty will not disturb the findings of the Trial Court unless they are "clearly erroneous." *McAllister v. United States*, 348 U.S. 19 (1954); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Morales v. City of Galveston*, *supra*.

The courts below searchingly examined the evidence and reached the same result and conclusion and a further review by this Court would serve no purpose whatsoever.

I. Seaworthiness is a factual question. The issue of whether a vessel must be equipped with transitional navigational devices in order to be seaworthy is a factual one like questions of seaworthiness generally. *Luckenbach* v. *W. J. McCahan, supra; Mahnich* v. *Southern SS Co., supra; Morales* v. *City of Galveston, supra*, and the determination of a particular factual issue is of little importance to the development of the maritime law. Despite Petitioner's attempts to dramatize the issue (Petitioner's Brief 5) no question of personal injury enters into the case; the claim is for loss of cargo and Petitioner's concern for the "lives of their masters and crew" is touching but inappropriate.

The Trial Court did not enunciate the proposition that "new navigational devices become essential to the seaworthiness of a vessel only upon proof of custom and practice in the industry to use them" (Petitioner's Brief 5) as Petitioner is well aware from the language of the Trial Court's opinion.

The Petitioner apparently attempting to rely on *Salem* v. *U. S. Lines Co.*, 370 U.S. 31, asserts that the Trial Court's decision is a "dangerous innovation" and "inconsistent" with this Court's decision in the *Salem* case (Petitioner's Brief 5).

The statement relied on by Petitioner in the *Salem*

case was made by this Court with reference to the question of the use of expert testimony in the determination of the necessity of certain devices in order for a vessel to be seaworthy:

> "The value of an expert's testimony to explain what the best safety device might be is clear but the question is simply whether some such device should have been provided. * * * *Nor would expert testimony about customary equipage be essential* * * * *nor, even if offered would it have concluded the question of unseaworthiness or negligence.*" (Emphasis supplied).

The implication of this Court's footnote statement in the *Salem* case is that expert testimony of customary equipage could be received but would not conclude the trier of fact upon the issue of seaworthiness. The Courts below clearly followed the decision of this Court in *Salem*. No claim has ever been made in this case that custom and usage is a "criterion of seaworthiness" as asserted by Petitioner (Petitioner's Brief, p. 6).

The Trial Court clearly recognized that custom and usage was not determinative of the issue of seaworthiness when it stated in referring to Judge Learned Hand's opinion *The T. J. HOOPER*, 60 F.2d 37 (C.A. 2, 1932):

> "* * * I believe in Judge Hand's truism that courts must in the end fix the standards of what is or is not a seaworthy ship."

The Trial Court recognized and followed this Court's decision in *Salem* v. *U. S. Lines Co.* by stating:

> "The ultimate conclusion of seaworthiness is for the trier of the facts rather than experts."

Respondent submits that no one can read the opinion of the Trial Court which was affirmed per curiam and adopted by the Court of Appeals and conclude that the Courts below failed to follow the "traditional test of seaworthiness" (Petitioner's Brief 6). To be seaworthy, a vessel must be reasonably fit for the voyage undertaken, considering all of the circumstance surrounding the voyage. *Martin* v. *Southwark*, 191 U.S. 1, 3 (1903); *Mitchell* v. *The TRAWLER RACER, INC.*, 362 U.S. 539, 550 (1960).

No claim has ever been made in this case that custom and usage is a criterion of seaworthiness. However, no contention can be made that custom and usage are improper elements for consideration in reaching the ultimate fact of seaworthiness when custom is considered together with the myriad factors which coalesce to make up the circumstances of the voyage. *Boudoin* v. *Lykes Bros. SS Co., supra; Metropolitan Coal Co.* v. *Howard, supra; United States Steel Products Co.* v. *American and Foreign Insurance Co., supra.*

The Trial Court did not hold that radar or loran were unnecessary for safe voyages, absent industry custom. The opinion of the District Court adopted in its entirety by the Court of Appeals stated:

> "It is my considered judgment that the employment of radar in connection with the navigation of tramp steamers under the facts and circumstances is still in a period of transition and at the time of this occurrence was not so essential to navigation that its absence would rise to a finding of unseaworthiness. I make the same finding with reference to the absence of loran."

It is a gross distortion to attribute to the Trial Court's decision the notion that customary practice dictates seaworthiness: custom and practice was considered because the parties introduced evidence on that subject, it was not the concluding factor in the Court's decision as a cursory reading of the opinion would indicate.

In support of the statement that industry practice is not determinative of seaworthiness, Petitioner cites *Davis* v. *Parkhill-Goodloe Company*, 302 F.2d 489 (C.A. 5, 1962), a civil action for the death of a young seaman. In *Davis* the Court considered the industry custom of safety devices as strong evidence against the shipowner saying at page 493:

> "* * * This was not offered, nor is it used by us, to establish a private standard of care as though the suit was for breach of the implied agreement to carry out these precautions. It was offered, *and it is so considered by us, as spectacular proof of industry wide acceptance of the need for extraordinary care in protecting against the various hazards here prevailing. Custom and practice, especially of prudence, is, of course, relevant and significant, in equating conduct with that of the law's fictional ordinarily careful shipowner.*" (Emphasis supplied)

In other words, the Court considered as relevant the evidence of industry in its practice in determining under all of the circumstances whether a seaworthy vessel had been provided.

Petitioner cites *Rodriguez* v. *Coastal Ship Corp.*, 1963 Am. Mar. Cas. 1825 (S.D. N.Y. 1962). Once again a careful reading of the judicial language indicates conformity to precisely the rule applied by the Courts below in this case.

"What an industry does or fails to do while it may have some evidentiary value, does not establish nor diminish the measure of legal duty—an absolute one to supply a seaworthy vessel. *Whether or not the shipowner has measured up to the duty is determined by the trier of the facts upon all of the evidence of a given case and not by the standard set by industry practice.*" (Emphasis supplied)

Respondent submits that it is clear that Petitioner misconstrues the decision of the Trial Court and the Court of Appeals and in doing so finds far reaching importance in a "decision" which the Courts below did not make. Petitioner's own authorities, carefully examined, show clearly that the District Court properly considered the evidence of custom and usage with regard to modern transitional navigational aids. The essence of the Trial Court's decision was a factual determination under all of the circumstances that the lack of certain transitional navigational aids did not render the vessel unseaworthy.

II. The decision of the Courts below does not conflict with the decisions of any other Circuit.

Petitioner erroneously contends that the decisions of the Courts below conflicts with the Second Circuit Decision in *The T. J. HOOPER*, 60 F.2d 737 (C.A. 2, 1932), and implores this Court to resolve the "conflict." The simple truth of the matter is that there is no conflict of Circuits on this issue. The decision of the Trial Court was, under all of the circumstances, that the PORTLAND TRADER was not unseaworthy by reason of lack of radar or loran and Respondent submits that the

Petitioner cites no decision in conflict therewith for the very simple reason that no decision in conflict exists. Indeed the only decision in point other than the decision of the Courts below is *Anglo-Saxon Petroleum Co. v. United States*, 88 Fed. Supp. 158 (D.C. Mass. 1950), and in that case it was held that a vessel without radar was not, for that reason, unseaworthy; there is dictum to the same effect in *Timur Fishing Corp. v. The Capt. Bill*, 160 F. Supp. 563 (D.C. Mass. 1958).

The *T. J. HOOPER* held that under the circumstances of the case presented the failure to equip a tug in 1932 some 32 years after the advent of radio with operational radio equipment rendered the vessel unseaworthy. During the course of the opinion Judge Learned Hand examined the role of custom and usage, both generally and in the field of navigation; he emphasized that reasonable prudence was often common prudence and in no place did he find that evidence of custom was irrelevant to a factual determination of seaworthiness.

Neither Judge Learned Hand or the Trial Court in this case followed or countenanced any such rule as Petitioner asserts (Petitioner's Brief 7) viz. that a navigational device can be essential to seaworthiness only where its use is customary. Respondent points out that in the fairly recent case of *Hendry Corporation v. Aircraft Rescue Vessels*, 113 Fed. Supp. 198 (D.C. La. 1953), the Court held that the absence of radio aboard a vessel did not, as a matter of law, render it unseaworthy. Also it would appear that perhaps *The T. J. HOOPER* decision is no longer the law in the circuit of

its origin. *Nuzzo* v. *Rederi*, 304 F.2d 506, 510 (C.A. 2 1962).

To deny certiorari in this case would not retard progress in the development of an adoption of modern navigational aids (Petitioner's Brief 8) where this Court has clearly established that seaworthiness is a question of fact to be determined from the totality of the evidence presented in each case. *Luckenbach* v. *W. J. McCahan*; *Mahnich* v. *Southern SS Co.*, *supra*; *Morales* v. *City of Galveston*, *supra*.

It is pure sophistry to assert that "The Supreme Court must examine the need for radar and loran in known dangerous waters where no aids to navigation are maintained." (Petitioner's Brief 8). This assumes, without foundation, that no aid to navigation was to be found aboard the PORTLAND TRADER. On the contrary, the evidence clearly showed that the PORTLAND TRADER was equipped with all of the known and time-honored traditional navigational aids and that she was traversing the Sulu Sea on a recognized and recommended steamer route.

Petitioner further contends that the finding of the Trial Court is inconsistent with the "established rule that the failure to use radar, if available, is gross fault." (Petitioner's Brief 8).

Petitioner's quotation of the so-called rule refers to radar "if available" and obviously this so-called rule has no applicability where the vessel is not in the first instance equipped with radar.

This Court under Rule 19 has made abundantly clear the considerations for the granting or refusing of a writ of certiorari and in this case there is absolutely no "conflict" with the decision of another Court of Appeals; no "important question of Federal law" and no "conflict" with the applicable decisions of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

KENNETH E. ROBERTS,
Proctor for Defendant
West Coast Steamship Company
12th Floor Standard Plaza,
Portland, Oregon 97204